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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SEVEN

THE PEOPLE, Plaintiff and Respondent, v. ERIC ALONSO CHINCHILLA, Defendant and Appellant.	B285438 (Los Angeles County Super. Ct. No. BA432553)

APPEAL from a judgment of the Superior Court of Los Angeles County, William N. Sterling, Judge. Affirmed in part; reversed in part and remanded with directions.

Brad Kaiserman, under appointment by the Court of Appeal, for Defendant and Appellant.

Xavier Becerra, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Lance E. Winters, Assistant Attorney General, Scott A. Taryle and Pamela C. Hamanaka, Deputy Attorneys General, for Plaintiff and Respondent.

Eric Alonso Chinchilla appeals from the judgment entered following his convictions after a jury trial on two counts of assault with a firearm; attempted willful, deliberate, and premeditated murder; and shooting at an occupied vehicle. The jury also found true the allegations Chinchilla committed the crimes for the benefit of a criminal street gang and used a firearm in the commission of the offenses.

On appeal Chinchilla contends the trial court erred in its instruction of the jury with CALCRIM No. 875 on the elements of assault with a firearm, and substantial evidence does not support his convictions for these offenses. He also asserts the trial court failed to instruct the jury on the offense of brandishing a firearm, which he argues is a lesser included offense of assault with a firearm. Chinchilla contends the convictions for attempted murder and shooting at an occupied vehicle also must be reversed because the six-pack photographic lineup on which the victim of the crimes relied in identifying Chinchilla as the shooter was impermissibly suggestive.

Chinchilla also requests we review the sealed record of the trial court's in camera hearing to determine whether the court disclosed all relevant complaints in response to his *Pitchess*[1] motion seeking discovery of the personnel records of the police officers involved in the investigation. Further, Chinchilla contends he is entitled to supplemental *Pitchess* discovery based on the complainants' unavailability, refusal to cooperate, or inability to remember the details of the complaints.

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[1] *Pitchess v. Superior Court* (1974) 11 Cal.3d 531, 536-538 (*Pitchess*).

In addition, Chinchilla raises multiple sentencing issues. He contends the trial court erred by imposing both the gang and firearm enhancements on counts 1 and 2. He also asserts the trial court erred in imposing a life term with a 15-year minimum parole eligibility requirement on count 3 pursuant to Penal Code[2] section 186.22, subdivision (b)(5), because the amended information alleged violation of a different subdivision of section 186.22. Chinchilla also argues remand is necessary for the trial court to exercise its discretion whether to strike the firearm enhancements imposed on counts 1 and 2 (§ 12022.5, subd. (a)) and counts 3 and 4 (§ 12022.53, subd. (d)). Further, he requests we remand for the trial court to conduct a hearing on his ability to pay the court facilities and operations assessments and restitution and parole revocation fines imposed by the trial court, in accordance with our opinion in *People v. Dueñas* (2019) 30 Cal.App.5th 1157.

We affirm the convictions but reverse the sentence and remand for resentencing with directions for the trial court to exercise its discretion whether to strike the firearm enhancements on counts 1 or 2. For any count as to which the trial court declines to strike the firearm enhancement, the court may impose only the enhancement under section 12022.5, subdivision (a), or section 186.22, subdivision (b)(1)(B), whichever carries the greater term. Further, on remand the trial court should allow Chinchilla to request a hearing and present evidence of his inability to pay the court facilities and operations assessments the court imposed. The trial court should also

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[2] Further statutory references are to the Penal Code unless otherwise indicated.

consider whether to allow Chinchilla to present evidence of his inability to pay the $5,000 restitution fine and the parole revocation restitution fine in the same amount imposed by the court.

FACTUAL AND PROCEDURAL HISTORY

A. *Amended Information*

The amended information charged Chinchilla with two counts of assault with a firearm (§ 245, subd. (a)(2); counts 1 & 2); attempted willful, deliberate, and premeditated murder (§§ 187, subd. (a), 664; count 3); and shooting at an occupied vehicle (§ 246; count 4). As to all counts, the amended information alleged Chinchilla committed the offenses for the benefit of, at the direction of, or in association with a criminal street gang. (§ 186.22, subd. (b)(1)(B) [counts 1 & 2]; *id.*, subd. (b)(1)(C) & (4) [count 3]; *id.*, subd. (b)(4) [count 4].) The amended information also specially alleged as to counts 1 and 2 that Chinchilla personally used a firearm. (§ 12022.5, subds. (a) & (d).) As to counts 3 and 4, the amended information specially alleged Chinchilla personally used a firearm (§ 12022.53, subd. (b)), personally and intentionally discharged a firearm (§ 12022.53, subd. (c)), and personally and intentionally discharged a firearm causing great bodily injury or death (§ 12022.53, subd. (d)).

Chinchilla pleaded not guilty and denied the special allegations.

B. *The Prosecution Case*

1. *The first incident (count 1)*

At about 11:00 p.m. on October 13, 2012 Almeido Arechiga was walking up his driveway when he saw a black two-door sports car approaching.[3] The car pulled up in front of Arechiga's house, and the passenger in the front seat yelled, "Where the fuck you from? This is Metro Gang. . . . Fuck Serotes." Arechiga knew "Serotes" was a disrespectful term for "Sereno," the name of the gang in the area where Arechiga lived.

When Arechiga failed to respond, the passenger, later identified by Arechiga as Chinchilla,[4] exited the car. Chinchilla pointed a black spray tip semiautomatic gun at Arechiga's chest as he approached Arechiga in the driveway. Chinchilla repeatedly asked Arechiga, "Where you from?" Arechiga responded as he backed away, "Nowhere." The driver of the car,

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[3] At trial, Arechiga identified two photographs of a black Mitsubishi Eclipse as being similar to the car he saw that night.

[4] On October 17, 2012 Los Angeles Police Detective Jose Ramirez and Officer Alejandro Diaz showed Arechiga two 6-pack photographic lineups that included Eric Guerrero and Lino Soltero, both of whom were Metro 13 gang members. Arechiga selected Guerrero's photograph, but wrote, "He is the person that most reminds me of the guy of the night, but my guy had [a] much rounder face, so it's not him. Just more similar to him." On October 30 Officer Diaz showed Arechiga a six-pack photographic lineup that included Chinchilla. Arechiga selected Chinchilla's photograph in position 2 and wrote on the page, "His face just stood out from the rest as the person who stood up from the car with the gun yelling, 'Where was I from, mother fucker.'" Arechiga also identified Chinchilla at trial as the man who pointed the gun at him.

who was standing outside the car, and the rear seat passenger also pointed their guns at Arechiga. When Chinchilla was about four feet from Arechiga, Arechiga lifted up his shirt to show he had no gang tattoos and said, "I'm not from nowhere." By that time the gun was 10 to 12 inches from Arechiga's chest. Chinchilla raised the gun to point it at Arechiga's face, and Chinchilla's "hand started shaking."

Arechiga told Chinchilla, "I cannot choose where I live. This is where I live. And I'm not part of anything." Chinchilla stood still while repeating, "Metro Gang," then walked back to the car. Chinchilla and the driver got into the car, and they and the rear passenger screamed, "Metro Gang. This is Metro Gang." They drove off, and Arechiga contacted the police.

2. *The second incident (count 2)*

At approximately 4:50 p.m. on October 14, 2012 Efrain Sarabia[5] was walking home from the bus stop when he noticed a black, two-door Eclipse stopped at a stop sign. Sarabia saw four or five men inside the car. A Hispanic male, later identified by Sarabia as Chinchilla,[6] got out of the front passenger side of the

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[5] Sarabia passed away from cancer prior to the trial. On October 3, 2013 Sarabia testified under oath in his hospital room by remote videotaped conferencing. The videotape displayed a split screen with Sarabia in the hospital on one side, and the courtroom with the judge, court clerk, Chinchilla, Chinchilla's attorney, and the prosecutor on the other side. The videotape of Sarabia's examination was played to the jury.

[6] On October 18, 2012 Detective Ramirez and Officer Diaz showed Sarabia a six-pack photographic lineup that did not include Chinchilla's photograph. Sarabia indicated the men in positions 1 and 2 looked similar to the person who pointed the

car, pointed a silver- or chrome-colored semiautomatic gun at Sarabia, and asked where he was from. Chinchilla had his finger on the trigger and was shaking the gun as he pointed it at Sarabia. Chinchilla was about 40 to 50 feet away from Sarabia. Sarabia understood Chinchilla was asking him to what gang he belonged. Sarabia stopped walking and immediately raised his hands to his sides as if he were being held hostage. Sarabia responded, "Nowhere," then added, "I'm from nowhere, I'm just here walking home." Chinchilla took a few more steps towards Sarabia while pointing the gun at him. Sarabia testified, "It looked like [Chinchilla] was going to pull the trigger but [he] did not . . . ." Chinchilla got back into the car and left, at which time Sarabia contacted the police.

3. *The third incident (counts 3 & 4)*

At around 10:00 p.m. on October 14, 2012 Danny Sequeida walked to his car to drive to the store to purchase beer. He had consumed a few beers at a family reunion at his brother's house before they ran out of beer. As Sequeida entered his car, a black

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gun at him. The men Sarabia identified did not have a relationship with the Metro 13 gang. On October 30 Officer Diaz showed Sarabia a different six-pack photographic lineup that included Chinchilla. Sarabia selected Chinchilla's photograph in position 2 and wrote, "Suspect got out [of] the car, pulled out a gun and said to me[,] 'Where you from'. I am not 100% sure if that is the guy with the gun." Sarabia testified he selected the photographs in position 2 on both October 18 and 30 because the men resembled the gunman. Both men had the same build, weighed 180 to 200 pounds, and had similar haircuts, skin tone, and facial hair. During the October 3, 2013 examination, Sarabia also identified Chinchilla as the man who pointed the gun at him.

Mitsubishi car pulled up on the opposite side of the street. Two men dressed in black exited the car. One man walked towards the front of Sequeida's car, while the other man walked towards the back of the car. The man at the front of Sequeida's car was holding a gun in his left hand by his left thigh, with the gun pointed down.

When the men were about 15 feet away from Sequeida, the man standing towards the front of Sequeida's car said, "Say cheese head." Sequeida heard the man because he had his window rolled down about an inch. Sequeida asked, "What are you talking about?" The man repeated, "Say cheese head." Sequeida responded, "I don't even live in L.A. I live somewhere else, not even close." The man kept saying, "Say cheese head." Sequeida then told him, "You got the wrong guy." Sequeida assumed the man was talking about a rival gang or gang initiation. Sequeida did not live in the area and was not familiar with the gangs there.

The man in front of the car then raised his gun and pointed it at Sequeida's face through the front windshield. At this point Sequeida noticed the silver barrel of the semiautomatic handgun. He could tell from the man's face "that something was going to happen." Sequeida ducked down toward the front passenger seat, then heard eight gunshots. Sequeida stayed down until he did not hear any more gunshots. A bullet struck Sequeida's left thigh, with the bullet entering his outer thigh and exiting his inner thigh. When Sequeida sat up, the shooter[7] and the other

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[7] As discussed below, Sequeida stated he did not recognize the shooter in a six-pack photographic lineup with Chinchilla's photograph that Detective Ramirez showed Sequeida on October 19, 2012, but on December 20, 2014, when Sequeida was

man had already gotten back into the black car. Sequeida saw the car make a U-turn and drive off.

Sequeida called the police, and Los Angeles Police Officer Rodolfo Pardo and his partner Officer Blanco arrived at the scene. Sequeida was sitting in the driver's seat of his car and told the officers he needed an ambulance. Officer Pardo observed blood on Sequeida's left pant leg. Sequeida initially was reluctant to tell the officers what happened, stating he was afraid and did not want to get involved. After the officers told Sequeida an ambulance was coming, Sequeida gave a brief statement. He stated two men wearing dark clothing had approached him and fired their guns at him. He described the men as being between 19 and 25 years of age.

Sequeida's car had five bullet holes in the driver's side door. In addition, the driver's side window was "blown out," and there was glass on the front seat. The officers recovered from the scene a .40-caliber cartridge, ten .40-caliber casings, a nine-millimeter live round, and two bullet fragments that were located near the driver's side door.

4. *The police investigation*

On October 15, 2012 Los Angeles Police Detective Jose Ramirez was assigned to the case as an investigating officer. He read the reports and concluded the suspect may be affiliated with the Metro 13 street gang. Using various databases, he

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shown another six-pack photographic lineup, he identified Chinchilla as the shooter. At the preliminary hearing on March 4, 2015 and at trial, Sequeida identified Chinchilla as the person who shot him.

determined Lino Soltero, a Metro 13 gang member, was the registered owner of a 2002 black, two-door Mitsubishi Eclipse.

On October 29, 2012 at about 9:45 a.m., Los Angeles Police Officer Ricardo Huerta and his partner Officer Aaron Skiver were in their patrol car near the intersection of Valley Boulevard and Alhambra Avenue. Officer Huerta observed a black Mitsubishi Eclipse that was wanted in connection with a shooting. The officers pulled up behind the car and activated the patrol car's lights and sirens to attempt to pull it over. The black car sped up and entered an alley before stopping. Chinchilla exited the front passenger side with a black semiautomatic gun in his hand. He ran eastbound, jumped a fence, and crossed the train tracks before Officer Huerta lost sight of him. The officers did not chase Chinchilla for officer safety because of the second man in the black car. Instead, they called for backup and detained Soltero, who was sitting in the driver's seat. Soltero told Officer Huerta that Chinchilla had been in the car with him. Chinchilla was not apprehended that day.

5. *The gang expert testimony*

Los Angeles Police Officer Eduardo Mercado, who was assigned to the gang and narcotics division, testified as a gang expert. As part of his duties, he monitored and met with active Metro 13 and El Sereno gang members on the street or when they were in custody, spoke with school personnel and residents in the area, and engaged in gang intervention.

Both the Arechiga and Sarabia incidents occurred in an area claimed by the El Sereno gang. A derogatory name for the El Sereno gang was "Serotes," which meant "turd[s]" in Spanish. Officer Mercado noted the question, "'where are you from' is very

common in asking a rival gang member about their neighborhood or gang they belong to." The El Sereno and Metro 13 gangs were rivals. The Eastlake and Lincoln Heights gangs claimed the area where Sequeida was shot. The derogatory terms for Eastlake gang members were "cheesecake" and "quesos," which meant cheese in Spanish, referring to the Eastlake cheese brand.

The Metro 13 gang claimed the area around California State University, Los Angeles as its territory. The Metro 13 gang was affiliated with the Mexican Mafia. The gang's symbols included the "M" graphics from the Monster drink can, "M & M" candy, and the Los Angeles Metropolitan bus line. The Metro 13 gang used "M" in their tattoos and hand signs. In their graffiti, the gang members mostly used "M" and the number "13" or Roman numeral "XIII," but they also used "Met Boys," "Metro Boys," or "M Boys."

In 2012 there were approximately 50 documented gang members, with about 25 actively engaging in some type of gang activity. Officer Mercado met about 20 active gang members; none was the same age, height, and weight as Chinchilla. He met Chinchilla more than five times. Chinchilla admitted to Officer Mercado his gang affiliation and that he was involved in gang activities. Chinchilla had gang tattoos, including a tattoo on his right arm of a bandit with the letter "M," referring to the Metro 13 gang, and an "A," which stood for his clique AFH. Chinchilla also had a gang tattoo that said "my boys," a term used only by Metro 13 members.

The Metro 13 gang activities included graffiti, vandalism, selling drugs, battery, robbery, assault, assault with a deadly weapon, attempted murder, and murder. In response to hypotheticals mirroring the facts of the Arechiga and Sarabia

incidents, Officer Mercado opined the crimes were committed for the benefit of a criminal street gang. The gang member's status is enhanced because "[h]e confronted somebody in a different gang area showing no fear, [and] show[ed] his associates or fellow gang members that he is willing to be violent or commit any crime anywhere." Even if the victim was not a rival gang member, the crime still benefits the Metro 13 gang because it "instills fear and an intimidation" within the community, and the rival gang will find out that the Metro 13 gang has been doing gang activities in the rival gang's area.

Likewise, based on a hypothetical mirroring the facts of the Sequeida incident, Officer Mercado opined the crime was committed for the benefit of the Metro 13 gang. The status of the gang and gang member are enhanced because the gang member went to another gang's area, confronted a victim he believed might be in another gang, and shot the victim. The shooting shows rival gangs that the gang member and the gang are willing to commit violence.

Officer Mercado also testified about two incidents involving Chinchilla and the Metro 13 gang in January and June 2012. On January 10, 2012 he and Los Angeles Police Officer Jorge Talledo[8] were on patrol when they saw Chinchilla with three Metro 13 gang members at a gas station. The Lincoln Heights and Clover gangs claimed the area around the gas station. The officers saw Chinchilla write "BES" and "Metro" on a wall near the dumpster area. "BES" stood for "Barrio" (Spanish for neighborhood) and "Eastside." The term "BES Metro" signified

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[8] Officer Talledo also testified about the January 10, 2012 graffiti incident at trial.

the location of the Metro 13 gang, which was on the eastside of Los Angeles. Above that was "MXIII," which stood for "Metro 13." Below "BES Metro" were the monikers of the seven gang members who were present, including Chinchilla, whose moniker was "Blacks." As the patrol car approached, Chinchilla looked at the car, dropped his marker, and ran in the opposite direction. The officers exited their car and ordered Chinchilla to stop, which he ignored. Officer Talledo noticed a nearby vehicle with other men inside, so he stayed to detain them. Officer Mercado and another officer pursued Chinchilla and arrested him.

About 12:30 a.m. on June 24, 2012 Officer Mercado responded to a request for assistance from the California State University, Los Angeles police. When he arrived, he saw the university police officers had detained Chinchilla and another individual, who was new to the Metro 13 gang. Chinchilla did not have any weapons on him. After Officer Mercado advised Chinchilla of his *Miranda*[9] rights, Chinchilla stated he was "putting in work" for the gang because he had seen rival El Sereno gang members in the Metro 13 gang area.[10] When referring to the El Sereno gang members, Chinchilla used the slang name, "Serotes." Chinchilla admitted he had sprayed graffiti on the walls in the area. The graffiti included "M" for "Metro," "MB for "Metro Boys," "S" for "Sereno," "K" for "killer," and "13." The "S" was crossed out with an "X" to show disrespect to the El Sereno gang. The graffiti also included a "V" for "varrio" (Spanish slang for neighborhood).

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9 *Miranda v. Arizona* (1966) 384 U.S. 436, 479.

10 Officer Mercado testified "putting in work" means engaging in criminal activity for the gang.

C. *The Defense Case*

1. *The alibi testimony*

Maria Manzo, Chinchilla's former girlfriend, testified that in October 2012 she spent the weekends with Chinchilla at his home, from Friday evening to Sunday night. At that time Chinchilla was living in a garage at his uncle's house. Manzo was with her cousin on October 12, 2012, then left later that day to spend the weekend with Chinchilla. She was with Chinchilla on October 13 and 14, and they did not go out that weekend. Manzo did not know Chinchilla was a Metro 13 gang member and did not meet Soltero or any other gang members. She and Chinchilla had a child together, but were no longer in a relationship.

Karla Cuellar, Chinchilla's cousin, testified Chinchilla lived in the garage towards the end of September or October 2012. Cuellar saw Manzo visiting Chinchilla on some weekends and staying with him in the garage. Chinchilla dated a second woman, Crystal Moreno, who stayed on other weekends when Manzo was not there. Cuellar did not know where Chinchilla went on the weekends, but she saw Chinchilla a lot when Manzo or Moreno spent the weekend there. Cuellar recalled Manzo was with Chinchilla during the weekend of October 13 and 14.

2. *The expert testimony on eyewitness identification*

Dr. Robert Shomer, who has a Ph.D. in experimental psychology, testified as an expert witness on perception memory and eyewitness identification. According to Dr. Shomer, the scientific community views eyewitness identification of strangers as having "a very low level of reliability." The scientific literature

indicates it is "very, very difficult" to identify a stranger. Strong emotions, including stress and fear, make eyewitness identification even less accurate. In addition, when an eyewitness is confronted by a person with a deadly weapon, his or her visual attention is drawn to the weapon and away from the face of the person holding the weapon, thereby reducing the accuracy of the identification.

It is essential that all the photographs in a photographic lineup match the witness's initial description of the suspect. If a witness is shown two photographic lineups that share one photograph in common, this adversely affects the accuracy of the eyewitness identification. Dr. Shomer testified, "[T]he whole task of trying to get the witness to see if there's someone in a set of pictures that he saw at the scene of a crime has—has been completely invalidated by that repetition." Further, having one common photograph in the two different photographic lineups sends the message "that we're particularly interested in this person."

Dr. Shomer also opined that showing the witness one photograph at a time, rather than an array of six photographs, is the better practice. Showing all the photographs at the same time reduces the accuracy of the identification because it encourages the witness to compare within that set to select the person that most resembles the suspect.

There is no correlation between the accuracy of the identification and the witness's confidence the identification is correct. An eyewitness can do his or her best to recall the suspect but still make a misidentification.

D. *The Verdicts and Sentence*

The jury found Chinchilla guilty on all counts. The jury also found the gang and firearm allegations true as to each count. As to count 3, the jury found true the special circumstance allegation Chinchilla committed the attempted murder willfully, deliberately, and with premeditation.

The trial court sentenced Chinchilla to an aggregate term of 65 years to life in state prison. The court selected count 1, assault with a firearm on Arechiga, as the base term. The court imposed on this count the upper term of four years, plus 10 years for the firearm enhancement (§ 12022.5, subd. (a)), and five years for the gang enhancement (§ 186.22, subd. (b)(1)(B)), for a total of 19 years. On count 2 for assault with a firearm on Sarabia, the court sentenced Chinchilla to one year (one-third the middle term of three years), plus three years four months (one-third of 10 years) for the firearm enhancement (§ 12022.5, subd. (a)), and one year eight months (one-third of five years) for the gang enhancement (§ 186.22, subd. (b)(1)(B)), for a total of six years. On count 3 for the attempted premeditated murder of Sequeida, the court sentenced Chinchilla to 15 years to life based on the gang enhancement (§ 186.22, subd. (b)(5)), plus a consecutive term of 25 years to life for the firearm enhancement (§ 12022.53, subd. (d)), for a total of 40 years to life. On count 4 for shooting at an occupied vehicle, the court sentenced Chinchilla to 15 years to life based on the gang enhancement (§ 186.22, subd. (b)(4)), plus 25 years to life for the firearm enhancement (§ 12022.53, subd. (d)), for a total of 40 years to life. The court stayed the sentence on count 4 pursuant to section 654.

The court imposed a $30 court facilities assessment (Gov. Code, § 70373) and a $40 court operations assessment (Pen. Code,

§ 1465.8, subd. (a)(1)) for each of the four counts, for a total of $120 for the court facilities assessments and $160 for the court operations assessments. The court also imposed a restitution fine of $5,000 (§ 1202.4, subd. (b)) and imposed and suspended a parole revocation restitution fine in the same amount (§ 1202.45). The trial court did not state its reasons for imposing the restitution and parole revocation restitution fines or why it imposed an amount above the $300 statutory minimum. (§§ 1202.4, subd. (b)(1), 1202.45.) At sentencing, Chinchilla did not object to imposition of the assessments and fines or raise his inability to pay.

Chinchilla timely appealed.

DISCUSSION

A. *The Trial Court Properly Instructed the Jury with CALCRIM No. 875*

Chinchilla contends the trial court erred in instructing the jury on the elements of an assault with a deadly weapon using CALCRIM No. 875 because the court failed to modify the instruction (1) to indicate assault is a specific intent crime; (2) to state an assault with a firearm is only committed once the defendant pulls the trigger; and (3) to inform the jury an intent to frighten is not a sufficient mens rea for an assault. These contentions lack merit.

"A trial court has a sua sponte duty to instruct the jury on the essential elements of a special circumstance allegation [citation] as well as the elements of a charged offense [citation]." (*People v. Mil* (2012) 53 Cal.4th 400, 409; accord, *People v. Spaccia* (2017) 12 Cal.App.5th 1278, 1287 ["A criminal defendant

has a right to accurate instructions on the elements of a charged crime."].) We review de novo whether the "instructions correctly state the law [citations] and also whether instructions effectively direct a finding adverse to a defendant by removing an issue from the jury's consideration [citations]." (*People v. Posey* (2004) 32 Cal.4th 193, 218; accord, *People v. Mendez* (2018) 21 Cal.App.5th 654, 659.) ""Instructions should be interpreted, if possible, so as to support the judgment rather than defeat it if they are reasonably susceptible to such interpretation."" (*Spaccia*, at p. 1287; accord, *People v. Webb* (2018) 25 Cal.App.5th 901, 906.)

For the two counts of assault with a firearm, the trial court instructed the jury with CALCRIM No. 875, as modified, in relevant part: "The defendant is charged in Counts 1 and 2 with assault with a firearm in violation of Penal Code section 245. [¶] To prove that the defendant is guilty of this crime, the People must prove that: [¶] 1. The defendant did an act with a firearm that by its nature would directly and probably result in the application of force to a person; [¶] 2. The defendant did that act willfully; [¶] 3. When the defendant acted, he was aware of facts that would lead a reasonable person to realize that his act by its nature would directly and probably result in the application of force to someone; [¶] AND [¶] 4. When the defendant acted, he had the present ability to apply force with a firearm. [¶] Someone commits an act willfully when he or she does it willingly or on purpose. It is not required that he or she intend to break the law, hurt someone else, or gain any advantage. [¶] . . . [¶] The People are not required to prove that the defendant actually touched someone. [¶] The People are not required to prove that

the defendant actually intended to use force against someone when he acted. . . ."

1. *The trial court properly instructed the jury that an assault is a general intent crime*

Chinchilla contends CALCRIM No. 875 mischaracterizes the elements of assault with a firearm by instructing the jury that assault is a general intent crime. He argues assault is a specific intent crime based on his reading of section 240, which defines assault as "an unlawful attempt, coupled with a present ability, to commit a violent injury on the person of another," and section 21a, which defines an attempt as "consist[ing] of two elements: a specific intent to commit the crime, and a direct but ineffectual act done toward its commission." But as acknowledged by Chinchilla, the Supreme Court has decided this question, concluding assault is a general intent crime.

As the Supreme Court held in *People v. Williams* (2001) 26 Cal.4th 779, 782 (*Williams*), "Thirty years ago, we examined the mental state for assault and concluded assault requires only a general criminal intent and not a specific intent to cause injury. (*People v. Rocha* (1971) 3 Cal.3d 893, 899 . . . .) Seven years ago, we reaffirmed *Rocha* and reiterated that assault was a general intent crime. (*People v. Colantuono* (1994) 7 Cal.4th 206, 215-216 . . . .) We further explained that the 'mens rea [for assault] is established upon proof the defendant willfully committed an act that by its nature will probably and directly result in injury to another, i.e., a battery.' (*Id.* at p. 214.) Today, we once again clarify the mental state for assault and hold that assault requires actual knowledge of the facts sufficient to establish that the defendant's act by its nature will probably and directly result in

injury to another." (Accord, *In re B.M.* (2018) 6 Cal.5th 528, 533 ["Assault is a general intent crime; it does not require a specific intent to cause injury."]; *People v. Perez* (2018) 4 Cal.5th 1055, 1066 ["assault with a deadly weapon is a general intent crime"]; *People v. Chance* (2008) 44 Cal.4th 1164, 1170 (*Chance*) ["'specific intent to injure is not an element of assault because the assaultive act, by its nature, subsumes such an intent'"].)

We are bound by the Supreme Court's pronouncement of the law. (*K.R. v. Superior Court* (2017) 3 Cal.5th 295, 308 ["'it is established that a holding of the Supreme Court binds all of the lower courts in the state, including an intermediate appellate court'"]; *People v. Johnson* (2012) 53 Cal.4th 519, 527-528 [decisions of Supreme Court are binding on appellate courts].) CALCRIM No. 875, which instructs the jury that assault with a deadly weapon is a general intent crime, is consistent with this Supreme Court precedent. (See *People v. Golde* (2008) 163 Cal.App.4th 101, 122 [CALCRIM No. 875 "was not defective in failing to tell the jurors they could consider the absence of injury as reflecting an absence of intent to harm"].)

2. *A defendant can commit an assault with a firearm without pulling the trigger*

Chinchilla contends an individual who points a loaded gun at someone lacks knowledge this action will probably and directly result in application of force because the application of force is not likely until the person pulls the trigger. In support of this argument, he asserts "the mens rea and actus reus established by the Supreme Court are inconsistent with each other,"[11] citing to

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11 "Except for strict liability offenses, every crime has two components: (1) an act or omission, sometimes called the actus

the discussions of actus reus in *Chance, supra*, 44 Cal.4th at page 1170, and mens rea in *People v. Williams, supra*, 26 Cal.4th at page 790 (*Williams*) and *People v. Colantuono*, *supra*, 7 Cal.4th at page 214 (*Colantuono*). The Supreme Court in *Chance* rejected this argument. (*Chance*, at pp. 1168, 1171.)

In *Chance*, the Supreme Court considered the actus reus required for assault, specifically, what is required for a defendant to have the "'present ability' to inflict injury" necessary to prove an assault under section 240, and concluded, "it is the ability to inflict injury on the present occasion that is determinative, not whether injury will necessarily be the instantaneous result of the defendant's conduct." (*Chance, supra*, 44 Cal.4th at p. 1171.) The *Chance* court explained, "Numerous California cases establish that an assault may be committed even if the defendant is several steps away from actually inflicting injury, or if the victim is in a protected position so that injury would not be 'immediate,' in the strictest sense of that term." (*Id*. at p. 1168.) The Supreme Court added, "The holdings in *Williams* and *Colantuono* were not intended to and did not transform the traditional understanding of assault to insulate defendants from liability until the last instant before a battery is completed." (*Id.* at p. 1171.)

The *Chance* court upheld the defendant's assault conviction, concluding he had the present ability to inflict injury on a police officer even though the defendant pointed his gun in the wrong direction (incorrectly believing the officer was in front

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reus; and (2) a necessary mental state, sometimes called the mens rea." (*People v. McCoy* (2001) 25 Cal.4th 1111, 1117; see § 20 ["In every crime or public offense there must exist a union, or joint operation of act and intent, or criminal negligence."].)

of him, although the officer had moved behind him), and the defendant could not fire his gun until he moved a new round into the firing chamber. (*Chance, supra*, 44 Cal.4th at pp. 1173, 1176.) The Supreme Court concluded the defendant's "conduct was sufficient to establish the actus reus required for assault." (*Id*. at p. 1176.) Chinchilla's reliance on *Williams* and *Colantuono* to argue a defendant must pull the trigger on a gun to commit an assault is misplaced because, as in *Chance*, a defendant need only have the ability to "inflict injury on the present occasion," even if injury will not "necessarily be the instantaneous result of the defendant's conduct." (*Chance*, at p. 1171.)

3. *An intent to intimidate or frighten the victim provides a sufficient mens rea for an assault*

Finally, Chinchilla argues CALCRIM No. 875 fails to inform the jury that an intent to intimidate provides an insufficient mens rea for assault.[12] But Chinchilla principally relies on cases that predate the Supreme Court's holding in *Williams*. (See *People v. Wolcott* (1983) 34 Cal.3d 92, 99 ["'a conviction for assault may not be grounded upon intent only to frighten'"]; *People v. Vidaurri* (1980) 103 Cal.App.3d 450, 463 [same]; *People v. Puckett* (1975) 44 Cal.App.3d 607, 614 [same].)

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[12] "A defendant is entitled to a pinpoint instruction, upon request, only when appropriate." (*People v. Gutierrez* (2009) 45 Cal.4th 789, 824; accord *People v. Jennings* (2010) 50 Cal.4th 616, 674.) Because we conclude Chinchilla's statement of the law is incorrect, we do not reach whether Chinchilla forfeited this argument by failing at trial to request a pinpoint instruction.

As explained by the Supreme Court in *Williams*, "[A] defendant guilty of assault must be aware of the facts that would lead a reasonable person to realize that a battery would directly, naturally and probably result from his conduct. He may not be convicted based on facts he did not know but should have known. He, however, need not be subjectively aware of the risk that a battery might occur." (*Williams, supra*, 26 Cal.4th at p. 788.) Under *Williams*, an intent to frighten can be a sufficient culpable mental state for assault if a defendant knew his or her act by its nature would directly and probably result in the application of physical force against someone, even if the defendant's intent was not to harm the victim. (See *id.* at p. 788, fn. 3 ["a defendant who honestly believes that his act was not likely to result in a battery is still guilty of assault if a reasonable person, viewing the facts known to defendant, would find that the act would directly, naturally and probably result in a battery"]; *People v. Bipialaka* (2019) 34 Cal.App.5th 455, 459 (*Bipialaka*) [defendant committed assault with a deadly weapon when he nearly caused a high-speed collision because he "knew his purpose was to use his masked face and his speeding car to freak [the victims] out," and that "[t]argeting a car this way would directly, naturally, and probably result in physical force being applied"].)

Chinchilla also relies on language in *People v. Ervine* (2009) 47 Cal.4th 745, 805, that "'[a]n intent to frighten or mere reckless conduct is insufficient,'" to support his contention an intent to frighten is insufficient to prove assault with a deadly weapon. But as explained recently by the Court of Appeal in *Bipialaka*, the language in *Ervine* is a quote from the "1996 trial court jury instruction, not from a Supreme Court holding modifying

Williams."[13] (*Bipialaka, supra*, 34 Cal.App.5th at p. 460.)[14] Because an intent to frighten may be a sufficient culpable mental state for an assault, the trial court properly declined to include a statement in the instruction to the contrary.

B. *Substantial Evidence Supports the Convictions for Assault with a Firearm*

Chinchilla contends there is insufficient evidence to support his convictions for assault with a firearm because there was no evidence the guns were loaded. However, Chinchilla's conduct and the circumstances of the crimes provide substantial evidence Chinchilla's gun was loaded in both incidents.

"'[A]n assault is not committed by a person's merely pointing an (unloaded) gun in a threatening matter at another person.' [Citation.] However, the fact that the gun was loaded may be inferred from circumstantial evidence, and we will uphold an assault conviction if the inference is reasonable." (*People v. Penunuri* (2018) 5 Cal.5th 126, 147 (*Penunuri*); accord, *People v. Rodriguez* (1999) 20 Cal.4th 1, 11, fn. 3, 12.) "A defendant's own words and conduct in the course of an offense may support a

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[13] The Supreme Court in *Ervine* did not address whether "'[a]n intent to frighten'" provided an insufficient mens rea for assault after *Williams*. (*People v. Ervine, supra*, 47 Cal.4th at p. 805.) Rather, the defendant there asserted he shot the gun by accident, not to frighten the victim. (*Id*. at p. 805, fn. 20.)

[14] The court in *Bipialaka* also concluded the Supreme Court's holding in *People v. Wolcott, supra*, 34 Cal.3d at page 99 was not controlling authority because it predated *Williams*, and the *Williams* court sought to "'clarify the mental state for assault.'" (*Bipialaka*, *supra*, 34 Cal.App.5th at p. 460, quoting *Williams, supra*, 26 Cal.4th at p. 787.)

rational fact finder's determination that he used a loaded weapon." (*Rodriguez*, at p. 13; *id*. at p. 12 [jury could reasonably have concluded defendant had present ability to harm the victim where he held a gun to the victim's chin and warned the victim if he did not keep his mouth shut, the defendant "could do to [the victim] what [he] did to [the others]"]; see *People v. Montgomery* (1911) 15 Cal.App. 315, 318 [defendant's statement as he pointed gun at victim, "'I have got you now,'" would be "meaningless" unless the gun was loaded].)

"In evaluating a claim regarding the sufficiency of the evidence, we review the record 'in the light most favorable to the judgment below to determine whether it discloses substantial evidence—that is, evidence which is reasonable, credible, and of solid value—such that a reasonable trier of fact could find the defendant guilty beyond a reasonable doubt.'" (*People v. Westerfield* (2019) 6 Cal.5th 632, 713; accord, *Penunuri, supra*, 5 Cal.5th at p. 142 ["'To assess the evidence's sufficiency, we review the whole record to determine whether *any* rational trier of fact could have found the essential elements of the crime or special circumstances beyond a reasonable doubt.'"].) "'The standard of review is the same in cases in which the prosecution relies mainly on circumstantial evidence.' [Citations.] 'We presume in support of the judgment the existence of every fact the trier of fact reasonably could infer from the evidence. [Citation.] If the circumstances reasonably justify the trier of fact's findings, reversal of the judgment is not warranted simply because the circumstances might also reasonably be reconciled with a contrary finding.'" (*Westerfield*, at p. 713; accord, *Penunuri*, at p. 142 ["'A reversal for insufficient evidence "is unwarranted unless it appears 'that upon no hypothesis

whatever is there sufficient evidence to support'" the jury's verdict.'"].)

On June 24, 2012 Chinchilla told Officer Mercado that he had sprayed gang graffiti because he saw rival gang members from El Sereno in the area claimed by Metro 13. Just four months later, on October 13, Chinchilla and two other Metro 13 gang members drove to El Sereno gang territory, each of them armed with guns. Chinchilla yelled at Arechiga in his driveway, "Where the fuck you from? This is Metro Gang. . . . Fuck Serotes." When Arechiga did not respond, Chinchilla exited the car, approached Arechiga, and pointed his gun at Arechiga's chest, repeatedly asking, "Where you from?" Then Chinchilla's hand started to shake as he held the gun just 10 to 12 inches away from Arechiga's face. Both the driver of the car and the back seat passenger also pointed guns at Arechiga.

A jury could reasonably infer from the circumstantial evidence that Chinchilla went to the El Sereno gang territory in response to the intrusion of El Sereno gang members into Metro 13 gang territory four months earlier. A jury could also reasonably infer that Chinchilla would not have approached Arechiga, a man he suspected was an El Sereno gang member, pointed a gun at his face, and asked him where he was from, unless the gun was loaded. Similarly, the jury could have relied on the fact Chinchilla's hand was shaking as he held the gun to Arechiga's face to support a finding the gun was loaded.

Like the assault on Arechiga the day before, Chinchilla's assault on Sarabia occurred in El Sereno gang territory. Chinchilla exited the car with his gun pointed at Sarabia, and Chinchilla asked Sarabia where he was from. Chinchilla's finger was on the trigger, and his hand was shaking. As with Arechiga,

the jury could reasonably have inferred Chinchilla would not have approached and pointed a gun at a man he suspected was an El Sereno gang member and asked where he was from, unless the gun was loaded. The jury also could reasonably have relied on the fact Chinchilla's finger was on the trigger and his hand was shaking as he pointed the gun at Sarabia. Moreover, both Sarabia and Sequeida testified Chinchilla pointed a silver-colored gun at them. A jury could reasonably infer the gun pointed at Sarabia was loaded based on Chinchilla's use of the same gun to shoot Sequeida about five hours later. (See *Penunuri, supra*, 5 Cal.5th at p. 147 ["[T]he jury could reasonably infer, as the prosecutor argued, that the gun [the defendant] pointed at [the victim] was the same gun used to kill [two other victims] a few hours later, and was therefore loaded at the time of the assault."].)

C. *Brandishing a Firearm Is Not a Lesser Included Offense of Assault with a Firearm*

"'A trial court has a sua sponte duty to "instruct on a lesser offense necessarily included in the charged offense if there is substantial evidence the defendant is guilty only of the lesser."'" (*People v. Gonzalez* (2018) 5 Cal.5th 186, 196, quoting *People v. Shockley* (2013) 58 Cal.4th 400, 403; accord, *People v. Landry* (2016) 2 Cal.5th 52, 96.) However, if a crime is a lesser related offense, a trial court cannot instruct on the uncharged related crime unless the prosecution and defense agree. (*People v. Mora and Rangel* (2018) 5 Cal.5th 442, 486 ["trial court is not obliged to instruct a jury on lesser related offenses even if requested" by the defendant]; *People v. Jennings* (2010) 50 Cal.4th 616, 668 [". . . California law does not permit a court to instruct concerning

an uncharged lesser related crime unless agreed to by both parties."].)

There are "two tests for whether a crime is a lesser included offense of a greater offense: the elements test and the accusatory pleading test. [Citation.] Either of these tests triggers the trial court's duty to instruct on lesser included offenses. Under the elements test, one offense is another's 'lesser included' counterpart if all the elements of the lesser offense are *also* elements of the greater offense. [Citation.] Under the accusatory pleading test, a crime is another's 'lesser included' offense if all of the elements of the lesser offense are also found in the *facts alleged* to support the greater offense in the accusatory pleading." (*People v. Gonzalez, supra*, 5 Cal.5th at p. 197; accord, *People v. Robinson* (2016) 63 Cal.4th 200, 207.)

We apply the elements test here because the amended information incorporates the statutory definition of assault with a firearm without additional factual allegations. (*People v. Robinson, supra*, 63 Cal.4th at p. 207 ["When, as here, the accusatory pleading incorporates the statutory definition of the charged offense without referring to the particular facts, a reviewing court must rely on the statutory elements to determine if there is a lesser included offense."]; *People v. Shockley, supra*, 58 Cal.4th at p. 404 ["because the information charging defendant with lewd conduct simply tracked [the statutory] language without providing additional factual allegations, we focus on the elements test"].) We independently review whether a trial court should have instructed on a lesser included offense. (*People v. Licas* (2007) 41 Cal.4th 362, 366; *People v. Cook* (2006) 39 Cal.4th 566, 596.)

Chinchilla contends the trial court had a duty to instruct on brandishing a firearm (§ 417, subd. (a)(2)) because it is a lesser included offense of assault with a firearm. This claim has been considered and consistently rejected by Courts of Appeal. (See *People v. Steele* (2000) 83 Cal.App.4th 212, 218 (*Steele*) ["Even though most assaults with a firearm undoubtedly include conduct fitting into the definition of brandishing, it has long been held that brandishing is a lesser related offense, rather than lesser included."]; *People v. Escarcega* (1974) 43 Cal.App.3d 391, 398 ["the Courts of Appeal of this state have expressly and consistently held that Penal Code section 417 does not cover or define an offense lesser than, and necessarily included within, the crime of assault with a deadly weapon as proscribed by Penal Code section 245"]; *People v. Torres* (1957) 151 Cal.App.2d 542, 544 ["The crime defined by Penal Code, section 417, is not an offense necessarily included within the crime of assault with a deadly weapon."].)

An assault with a firearm, like other types of assault, is "an unlawful attempt, coupled with a present ability, to commit a violent injury on the person of another." (§ 240; see § 245, subd. (a)(2) [setting punishment for assault with firearm].) A person brandishes a firearm if he or she "in the presence of any other person, draws or exhibits any firearm, whether loaded or unloaded, in a rude, angry, or threatening manner, or who in any manner, unlawfully uses a firearm in any fight or quarrel . . . ." (§ 417, subd. (a)(2).) As the Court of Appeal in *Steele* explained, "[I]t is theoretically possible to assault someone with a firearm without exhibiting the firearm in a rude, angry or threatening manner, e.g., firing or pointing it from concealment, or behind the victim's back." (*Steele, supra*, 83 Cal.App.4th at p. 218; accord,

People v. Escarcega, supra, 43 Cal.App.3d at p. 398 ["Obviously an assault with a deadly weapon may be perpetrated without drawing or exhibiting it in a rude, angry, or threatening manner, or using it in a fight or quarrel. It might be committed by a hidden sniper, or by a stealthy prison stabbing, or in other innumerable ways without at the same time being a violation of section 417."].) We find *Steele* and *Escarcega* persuasive and conclude brandishing a firearm is not a lesser included offense of assault with a firearm.

Chinchilla contends *Steele* was wrongly decided, although he fails to cite to any cases that reach a contrary conclusion. Instead, he notes brandishing a weapon under section 417, subdivision (a)(2), does not require a victim to be aware of the weapon in his or her presence, citing to *People v. McKinzie* (1986) 179 Cal.App.3d 789, 794 (*McKinzie*). Chinchilla is correct that, to prove the crime of brandishing a weapon, the exhibition of a weapon in a rude, angry, or threatening manner must be done "'in the presence of a victim,'" but the victim does not need to be aware of the weapon. (*McKinzie*, at p. 794; accord, *In re Michael D.* (2002) 100 Cal.App.4th 115, 124 [Section 417, subdivision (a)(2), "is violated when the perpetrator brandishes the weapon in a threatening manner, even if the person being threatened did not see it."].) As the court in *McKinzie* explained, "For purposes of the conduct which the statute is meant to deter, it is enough that the brandishing be in public, in the presence of the victim, where some third party happening along might get the idea that either the victim or brandisher need help, or might think a brawl is in the making which he might join. The thrust of the offense is to deter the public exhibition of weapons in a context of potentially volatile confrontations. The victim's

unawareness of the weapon does little to mitigate the danger inherent in such situations." (*McKinzie*, at p. 794.)

It does not follow, however, that brandishing a weapon is a lesser included offense of an assault with a firearm, an issue not addressed in *McKinzie*. It is true that if a person exhibits a loaded firearm in a rude, angry, or threatening manner from behind the victim's back, it could be both brandishing and an assault with a firearm. But it is also true that if a person points a firearm at a victim from a concealed location, such as behind a trailer as in *Chance*, it would not constitute brandishing if it was not done in the presence of the victim, but it would still be an assault if the defendant had the present ability to inflict injury. (See *Chance, supra*, 44 Cal.4th at pp. 1175-1176 ["defendant's loaded weapon and concealment behind the trailer gave him the means and the location to strike 'immediately' at [the police officer], as that term applies in the context of assault."].) Because brandishing a firearm is not a lesser included offense of assault with a firearm, the trial court had no duty to instruct on the offense.

D. *Sequeida's Identification of Chinchilla Was Not Based on an Impermissibly Suggestive Photographic Lineup*

Chinchilla contends his due process rights were violated because Sequeida's identification of him was based on an impermissibly suggestive six-pack photographic lineup.[15] We conclude otherwise.

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[15] Chinchilla first raised this issue in a motion for a new trial. As discussed below, because the December 20, 2014 photographic lineup was not unduly suggestive, the trial court did not abuse its discretion in denying Chinchilla's motion for a new trial based on

1. *The photographic lineups*[16]

On October 18, 2012 Detective Ramirez and Officer Diaz showed Sequeida two 6-pack photographic lineups that included Soltero and Eric Guerrero, two Metro 13 gang members. Sequeida did not recognize anyone in either photographic lineup. He stated the only person he would be able to identify was the person armed with the silver-colored handgun who shot him.

On October 19, 2012 Detective Ramirez showed Sequeida two more six-pack photographic lineups, one of which included Chinchilla's photograph in the second position.[17] Sequeida stated he did not recognize anyone in the two 6-pack photographic

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the identification procedure. (*People v. O'Malley* (2016) 62 Cal.4th 944, 1016 [""[T]he trial court has broad discretion in ruling on a new trial motion . . . ," and its "ruling will be disturbed only for clear abuse of that discretion."""]; *People v. Howard* (2010) 51 Cal.4th 15, 42-43 [""""The determination of a motion for a new trial rests so completely within the court's discretion that its action will not be disturbed unless a manifest and unmistakable abuse of discretion clearly appears."""""].) We do not reach whether Chinchilla forfeited his challenge to the identification procedure by his failure to object at trial or his contention his attorney's failure to object constituted ineffective assistance of counsel.

16 Chinchilla does not challenge the identifications by Arechiga and Sarabia of Chinchilla in the six-pack photographic lineups shown to them.

17 Detective Ramirez included Chinchilla in the photographic lineup because Chinchilla was a Metro 13 gang member who matched the physical description given by the victims of being about 19 to 25 years of age, five feet 11 inches tall, heavyset, with a round face and dark skin.

lineups. While viewing the two 6-pack photographic lineups, Sequeida stated he felt uncomfortable trying to pick the shooter out of the lineups. He did not want to get involved in the investigation or have to come to court in light of his full-time employment. He also preferred not to identify the shooter from a photographic lineup because he did not want to make a mistake. Sequeida added he would be able to recognize the shooter if he saw him in person.

Detective Ramirez attempted unsuccessfully over the next two years to have Sequeida participate in an in-person lineup. In late October 2012 Detective Ramirez called Sequeida two or three times and left voice mail messages, but according to Detective Ramirez, Sequeida did not return the calls. On October 30, 2012 and June 18, 2013 Detective Ramirez left business cards at Sequeida's home, with a request that Sequeida contact him. Detective Ramirez testified Sequeida did not contact him. Sequeida testified he returned the call, but he did not provide any specifics and acknowledged he never observed an in-person lineup. Sequeida denied he was afraid something bad might happen to him if he took part in the investigation. But he acknowledged that about a month after the shooting he told the prosecutor he did not "want to go and testify, only because of my family." Sequeida later decided to cooperate after he spoke with relatives who told him it was best to "go along with this and go through with it."

Detective Ramirez lost contact with Sequeida in November or December 2014 after Sequeida moved. Thomas Snook, an investigator for the district attorney's office, later located Sequeida and arranged an interview. On December 20, 2014 the prosecutor and Snook interviewed Sequeida at his house. Before

the interview, Snook prepared a six-pack photographic lineup that included photographs of Chinchilla and individuals who looked similar to him. Before showing Sequeida the six-pack photographic lineup, Snook read the following admonition: "Please look at all six photographs before making any comment. 'The person who committed the crime may or may not be among those shown in the photographs you are about to see. If you recognize any of the persons in the photographs as the suspect, go back and pick out the person you recognize. If you recognize any of the persons, please do not ask me whether you[r] choice was right or wrong as I am prohibited by law from telling you.'" Sequeida stated he understood the admonition, then signed and dated the written admonition. Sequeida selected Chinchilla, who was in position 3 in the photographic lineup, as the person who shot him.

2. *The photographic lineup was not unduly suggestive*

""In order to determine whether the admission of identification evidence violates a defendant's right to due process of law, we consider (1) whether the identification procedure was unduly suggestive and unnecessary, and, if so, (2) whether the identification itself was nevertheless reliable under the totality of the circumstances, taking into account such factors as the opportunity of the witness to view the suspect at the time of the offense, the witness's degree of attention at the time of the offense, the accuracy of his or her prior description of the suspect, the level of certainty demonstrated at the time of the identification."" (*People v. Thomas* (2012) 54 Cal.4th 908, 930; accord, *People v. Clark* (2016) 63 Cal.4th 522, 556.) ""Only if the

challenged identification procedure is unnecessarily suggestive is it necessary to determine the reliability of the resulting identification.'"'" (*Thomas*, at pp. 930-931; accord, *People v. Alexander* (2010) 49 Cal.4th 846, 902.)

"'The defendant bears the burden of demonstrating the existence of an unreliable identification procedure.'" (*People v. Gonzalez* (2006) 38 Cal.4th 932, 942; accord, *People v. Avila* (2009) 46 Cal.4th 680, 700 [defendant has "the burden of demonstrating the identification procedure was unduly suggestive"].) '"'"We review deferentially the trial court's findings of historical fact, especially those that turn on credibility determinations, but we independently review the trial court's ruling regarding whether, under those facts, a pretrial identification procedure was unduly suggestive."'"' (*People v. Thomas, supra*, 54 Cal.4th at p. 930; *People v. Clark, supra*, 63 Cal.4th at pp. 556-557.)

Chinchilla contends the December 20, 2014 photographic lineup was impermissibly suggestive because he was the only individual who was in both that photographic lineup and the one shown to Sequeida on October 19, 2012. Chinchilla's photograph was in the second position in the October 19, 2012 photographic lineup and the third position in the December 20, 2014 photographic lineup. Further, Chinchilla asserts the December 20, 2014 photographic lineup was unduly suggestive because he was the only individual wearing a gray shirt. Both contentions lack merit.

Although Chinchilla was the only person common to both photographic lineups, this alone does not render the later photographic lineup impermissibly suggestive. (*People v. Yeoman* (2003) 31 Cal.4th 93, 124 [procedure under which detective

showed witness two photographic lineups one month apart, with defendant's photograph in the fourth position each time, but with a more recent photograph the second time, was not unduly suggestive]; *People v. DeSantis* (1992) 2 Cal.4th 1198, 1224 ["The fact that defendant was the only person common to both [the photographic and in-person] lineups did not per se violate his due process rights."]; *People v. Blair* (1979) 25 Cal.3d 640, 658, 660-661 [rejecting argument that witness was unduly influenced in his identification of defendant in an in-person lineup where more than two months earlier witness was shown four sets of photographic lineups in which defendant appeared in three lineups, each containing between six and 15 photographs].)

As the Supreme Court explained in *People v. Yeoman, supra*, 31 Cal.4th at page 124, "To use a suspect's image in successive lineups might be suggestive if the same photograph were reused or if the lineups followed each other quickly enough for the witness to retain a distinct memory of the prior lineup. But here, different photographs of defendant appeared in each lineup, and the two lineups were separated in time by a month. Under these circumstances we see no reason to believe that the use or position of defendant's image in both lineups was unnecessarily suggestive." Here, although the photographic lineups appear to have used the same photograph of Chinchilla, they were shown to Sequeida two years apart, minimizing any effect the repetition might have on Sequeida's identification of Chinchilla.

Moreover, the fact Chinchilla was the only person wearing a gray shirt in the December 20, 2014 photographic lineup was not unduly suggestive, especially given that none of the witnesses described the perpetrator as wearing a gray shirt. (*People v.*

Carter (2005) 36 Cal.4th 1114, 1163 [rejecting argument that the six-pack photographic lineup was unduly suggestive because defendant was the only person wearing an orange shirt]; *People v. Johnson* (1992) 3 Cal.4th 1183, 1217-1218 ["fact that defendant was the only person depicted in jail clothing . . . was not unduly suggestive" because "[t]here was no evidence that [the victim] knew what jail clothing looked like when she made the identification"]; *People v. DeSantis, supra*, 2 Cal.4th at p. 1223 [fact that only defendant wore a red shirt in a five-pack photographic lineup where perpetrator wore red jacket during crime did not make photographic lineup unduly suggestive].)

Chinchilla also contends Sequeida's trial testimony shows the prosecutor's conduct during the December 20, 2014 meeting at which Snook showed Sequeida the photographic lineup tainted the identification procedure. During the prosecutor's examination, Sequeida testified:

"Q. When you met with myself and investigator Snook in December, did I ever tell you who to pick out when you looked at those pictures?

"A. Yes.

"Q. What did I say? Did I point out to the picture of the man that shot you? Did I tell you who that person was? Did I tell you who the right person was to pick out?

"A. At the—I don't recall.

"Q. Did I tell you who the person was that shot you in one of those picture[s] or did you tell me?

"A. I told you.

"Q. And did I tell you whether or not you picked the right guy?

"A. You just said if that was the guy that—circle the face of the guy that did it."

Although Sequeida provided ambiguous testimony about whether the prosecutor played a role in Sequeida's identification of Chinchilla, there was no evidence the prosecutor engaged in any improper conduct. Before Sequeida was shown the photographic lineup on December 20, 2014, Snook gave him a photographic lineup admonition, which Sequeida stated he understood, then confirmed by signing the written admonition. Snook testified neither he nor the prosecutor pointed out Chinchilla in the photographic lineup or confirmed whether Sequeida selected the right person. Further, Sequeida did not look at Snook or the prosecutor while he was viewing the photographic lineup. Snook testified, "[Sequeida's] focus was totally on the six-pack. And he never looked at either one of us until he said, 'It looks like three.'" Chinchilla has therefore not met his burden to show the identification procedure was unduly suggestive.

E. *The Trial Court Disclosed All Relevant Materials at the* Pitchess *Hearing*

1. *Chinchilla's* Pitchess *motion*

On September 15, 2015 Chinchilla filed a *Pitchess* motion pursuant to Evidence Code section 1043, seeking discovery of personnel records concerning "any instance of or investigation into relevant conduct, including but not limited to incidents of misconduct or moral t[u]rpitude" involving Officers Diaz, Huerta, Skiver, and Detective Ramirez.[18] The Los Angeles Police

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[18] Chinchilla sought disclosure of all complaints of misconduct, including any incidents relating to discharge of

Department and the named officers opposed the motion. On September 30, 2015 the trial court granted the *Pitchess* motion, but limited its order to disclosure of information concerning fabrication by any of the four officers. The court conducted an in camera hearing and ordered disclosure of three complaints involving Officer Huerta, one complaint involving Officer Skiver, and one complaint involving Officers Huerta and Skiver. The trial court did not order any disclosure as to Officer Diaz and Detective Ramirez.

2. *The trial court released all discoverable materials responsive to its order granting the* Pitchess *motion*

"When a defendant shows good cause for the discovery of information in an officer's personnel records, the trial court must examine the records in camera to determine if any information should be disclosed." (*People v. Winbush* (2017) 2 Cal.5th 402, 424; accord, *People v. Anderson* (2018) 5 Cal.5th 372, 391.) "The court may not disclose complaints over five years old, conclusions drawn during an investigation, or facts so remote or irrelevant that their disclosure would be of little benefit." (*Winbush*, at p. 424; see Evid. Code, § 1045, subd. (b).) "'A trial court's ruling on a motion for access to law enforcement personnel records is subject to review for abuse of discretion.'" (*People v. Landry, supra*, 2 Cal.5th at p. 73, quoting *People v. Hughes* (2002) 27 Cal.4th 287, 330; accord *Anderson*, at p. 391.)

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weapons, use of excessive force, bigotry, false arrest, fabrication of charges and evidence, unreasonable or illegal searches and seizures, dishonesty, racism, improper tactics, neglect of duty, and conduct unbecoming a police officer.

Chinchilla requests we review the sealed portion of the record, which includes the transcript of the in camera hearing. The People do not object to the request. Chinchilla's request for an independent in camera review is proper. (*People v. Anderson, supra*, 5 Cal.5th at p. 391 ["Defendant properly asks us to review the sealed record of the in camera hearing to determine whether the court erroneously failed to provide discovery that he should have received."]; *People v. Hughes, supra*, 27 Cal.4th at p. 330 [conducting independent examination of materials in camera on appeal].)

We have reviewed the sealed record. The trial court reviewed the records, made a detailed record of what it reviewed, and released all relevant discoverable materials. The court did not abuse its discretion. (See *People v. Anderson, supra*, 5 Cal.5th at p. 391; *People v. Winbush, supra*, 2 Cal.5th at p. 424.)

F. *The Trial Court Erred in Denying Chinchilla's Motion for Supplemental* Pitchess *Discovery as to Three Complaints, But the Error Was Harmless*

1. *The motion for supplemental* Pitchess *discovery*

On October 26, 2015 Chinchilla filed a motion for supplemental discovery of peace officer personnel records. Chinchilla's attorney stated he had received disclosure of the names, addresses, and telephone numbers for four complainants (Gustavo Subuyuj, Elsa Deras, Monica Ramirez, and Karen Membreno), but no contact information as to a fifth complainant (Monica Melendez). Chinchilla's attorney spoke with the four complainants for whom he had telephone numbers. According to the attachments to Chinchilla's motion, Subuyuj denied he had a run-in with any police officer. Deras stated she was afraid to

testify against Officer Skiver after the officer displayed his gun and called her a liar for testifying her friend did not have a gun at the time of his arrest. Ramirez's attorney stated Ramirez had filed a civil action against Officer Huerta, and he refused to disclose any more information. Membreno could not recall the details of the incident except that it involved a child in her care. Chinchilla's attorney could not reach Melendez because he did not have her telephone number.

Chinchilla contended he was unable to obtain sufficient information to determine the nature of the complaints made by the five complainants. He requested "supplemental disclosure of any and all verbatim reports, documents, memos, notes, and/or recordings concerning the previously disclosed complainant(s) and/or witness(es) . . . ."

At the October 26, 2015 hearing, the trial court denied the motion for supplemental discovery. The court explained as to Melendez, "[T]he court is looking at these documents. The first one has the name of Monica Melendez highlighted. It has no phone contact number, yet . . . it lists witnesses, and then at the bottom it has another name, Joseph [Flores,] with the same identical address as Monica Melendez with a cell number. [¶] So I don't know what you are missing there. The job is required to go and investigate and perhaps go and find out from that individual at the residence." As to the other complainants, Chinchilla's attorney argued they did not want to talk about their complaints against the officers. The court responded, "And there is nothing that the court can do with respect to that. That is their choice. They are entitled to do that."

2. *Chinchilla was entitled to supplemental discovery, but the trial court's error was harmless*

"When the trial court, in exercising its discretion, grants a defendant's *Pitchess* motion, it orders disclosure of the names, addresses, and telephone numbers of individuals who have in the past witnessed alleged officer misconduct or who have complained of misconduct by the officer named in the motion." (*Galindo v. Superior Court* (2010) 50 Cal.4th 1, 5; accord, *Warrick v. Superior Court* (2005) 35 Cal.4th 1011, 1019.) "On those occasions when that information proves insufficient, either because a witness does not remember the earlier events or the witness cannot be located, a supplemental *Pitchess* motion may be filed and the statements of the witnesses may be disclosed to the defendant." (*People v. Ghebretensae* (2013) 222 Cal.App.4th 741, 757 (*Ghebretensae*); accord, *Pitchess, supra*, 11 Cal.3d at p. 537 [defendant established good cause for discovery of prior statements by two complainants made against named deputy sheriffs where the complainants were unavailable for interviews]; *Alvarez v. Superior Court* (2004) 117 Cal.App.4th 1107, 1110, 1114 (*Alvarez*) [defendant was entitled to supplemental *Pitchess* discovery where a deputy sheriff refused to discuss his complaint against named deputy sheriff]; *City of Azusa v. Superior Court* (1987) 191 Cal.App.3d 693, 696-697 [plaintiffs would be entitled to records of complainants' statements only after a showing the complainants were "unavailable for interviews or could not remember the details of the events about which they had complained"].)

We review for an abuse of discretion the ruling on a motion for supplemental *Pitchess* discovery. (*Pitchess, supra*, 11 Cal.3d at p. 535 ["A defendant's motion to discover is addressed solely to

the sound discretion of the trial court, which has inherent power to order discovery when the interests of justice so demand."]; *Alvarez, supra*, 117 Cal.App.4th at p. 1113 [denial of supplemental discovery reviewed for abuse of discretion].) "[A] defendant who has established that the trial court erred in denying *Pitchess* discovery must also demonstrate a reasonable probability of a different outcome had the evidence been disclosed." (*People v. Gaines* (2009) 46 Cal.4th 172, 182 (*Gaines*); accord, *People v. Samuels* (2005) 36 Cal.4th 96, 110 (*Samuels*) [denial of *Pitchess* motion was harmless error under *People v. Watson* (1956) 46 Cal.2d 818, 836].)

The trial court did not abuse its discretion in denying the motion for supplemental discovery of the complaint made by Melendez against Officer Huerta and the complaint Deras made against Officer Skiver because Chinchilla failed to establish good cause. Although Chinchilla's attorney asserted he could not contact Melendez because he did not have her telephone number, as the trial court noted, disclosed witness Joseph Flores shared the same address as Melendez, and the disclosure included his cell phone number. Chinchilla's attorney could have contacted Melendez through Flores or travelled to Melendez's residence. Because Chinchilla's attorney made no effort to contact Melendez in person or by telephone, the trial court did not abuse its discretion in finding there was no good cause for supplemental *Pitchess* discovery based on witness unavailability.

As for Deras, she spoke with Chinchilla's attorney about her complaint. Deras stated she was afraid to testify against Officer Skiver because he had displayed his gun and called her a liar after she testified at a preliminary hearing that her friend did not have a gun with him at the time he was arrested in his

car. Although Deras was afraid to testify at trial, she was available and cooperative, and she remembered the details of the incident. Further, Chinchilla could have issued a trial subpoena to compel Deras to testify at trial.

As for the Subuyuj, Ramirez, and Membrano complaints, the trial court abused its discretion in denying Chinchilla's motion for supplemental discovery because Chinchilla established good cause for all three complaints.[19] Subuyuj made a complaint against Officers Huerta and Skiver, but told Chinchilla's attorney he did not have a run-in with any officers. Whether Subuyuj could not remember the incident or was uncooperative, either provides good cause for supplemental discovery. (*Pitchess, supra*, 11 Cal.3d at p. 537; *Ghebretensae, supra*, 222 Cal.App.4th at p. 757; *Alvarez, supra*, 117 Cal.App.4th at p. 1114.) As for Ramirez, her attorney stated Ramirez had filed a civil action against Officer Huerta, but he declined to discuss the matter. Ramirez's lack of cooperation supports good cause for

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[19] The People contend Chinchilla's attorney did not conduct due diligence because he only spoke with four of the complainants by telephone and did not engage in a reasonable investigation, citing *People v. Sanders* (1995) 11 Cal.4th 475, 523. But *Sanders* concerned the due diligence required in procuring a witness's attendance at trial before that witness can be deemed unavailable under Evidence Code section 240, not *Pitchess* discovery. (*Sanders*, at p. 523.) Likewise, the People's reliance on *Ghebretensae, supra*, 222 Cal.App.4th at page 758, is misplaced. In *Ghebretensae*, the court found counsel's declaration lacked an adequate foundation to establish a witness's unavailability because it was made upon information and belief. (*Ibid.*) Here, the declaration of Chinchilla's attorney is based on his personal knowledge.

supplemental discovery. (*Alvarez*, at p. 1114.) Chinchilla also demonstrated good cause for supplemental disclosure of Membreno's complaint against Officer Huerta because she could not recall the details of the incident except that it involved a child in her care. (*Ghebretensae*, at p. 757.)

Because Chinchilla showed good cause for supplemental *Pitchess* discovery, the trial court erred by denying the motion based on its mistaken belief that nothing more could be done if the complainants were uncooperative. (*People v. Knoller* (2007) 41 Cal.4th 139, 156 ["[A]n abuse of discretion arises if the trial court based its decision on impermissible factors [citation] or an incorrect legal standard [citations]."]; *Wade v. Superior Court* (2019) 33 Cal.App.5th 694, 709 ["'[A] discretionary order based on an application of improper criteria or incorrect legal assumptions is not an exercise of informed discretion . . . .'"].) However, the trial court's denial of the motion for supplemental *Pitchess* discovery as to the Membreno, Ramirez, and Subuyuj complaints was harmless error. All three complainants filed complaints against Officer Huerta. Officer Huerta's testimony was not relevant to Chinchilla's defense that he had not committed an assault of Arechiga and Sarabia, and it had minimal relevance to Sequeida's asserted misidentification of Chinchilla in the photographic lineup.

Officer Huerta testified about an incident on October 29, 2012, which occurred two weeks after the Arechiga, Sarabia, and Sequeida incidents. His testimony established that on October 29 Chinchilla was with Soltero, the owner of the black car that was connected to the October 13 and 14 incidents. Officer Huerta testified that after the car was pulled over, Chinchilla fled while carrying a black gun. Chinchilla does not

dispute that he knows Soltero, nor is it disputed that both Chinchilla and Soltero were members of the Metro 13 gang, which had only 25 active gang members. Indeed, because of their gang connection, by October 19 Detective Ramirez placed Chinchilla's photograph in the photographic lineup he showed to Sequeida. In addition, the black gun Chinchilla carried on October 29 was not the same gun used in the Arechiga assault, which Arechiga described as a black spray tip gun, or the silver gun used in the Sarabia and Sequeida incidents. Further, Officer Huerta had no involvement in the identification procedure challenged by Chinchilla. Had the trial court granted supplemental *Pitchess* discovery on the Membreno, Ramirez, and Subuyuj complaints made against Officer Huerta, it is not reasonably probable disclosure of the complaints would have led to a different outcome at trial. (*Gaines, supra*, 46 Cal.4th at p. 182; *Samuels, supra*, 36 Cal.4th at p. 110.)

Subuyuj also filed a complaint against Officer Skiver, who responded to the October 29, 2012 incident with Officer Huerta. Similar to Officer Huerta, any testimony about Officer Skiver had minimal if any relevance to Chinchilla's defense. In addition, because Officer Skiver did not testify at trial, his credibility was not at issue. Thus, as to this complaint as well, it is not reasonably probable disclosure of the complaint would have led to a different outcome at trial. (*Gaines, supra*, 46 Cal.4th at p. 182; *Samuels, supra*, 36 Cal.4th at p. 110.)

G. *The Trial Court Erred in Imposing Both the Gang and Firearm Enhancements on Counts 1 and 2*

Chinchilla contends the trial court erred in imposing the five-year gang enhancement under section 186.22, subdivision

(b)(1)(B), and the 10-year firearm enhancement under section 12022.5, subdivision (a). We agree.

The Supreme Court in *People v. Le* (2015) 61 Cal.4th 416, 424-425 (*Le*) resolved this issue in the context of the defendant's use of a firearm in his commission of an assault with a semiautomatic weapon, concluding the sentence was unauthorized. (*Id*. at p. 429.) As the Supreme Court explained, section 186.22 provides different levels of enhancement for a base felony if the felony is committed for the benefit of a criminal street gang depending on whether the base felony is a serious or violent felony, or is neither. (*Le*, at pp. 422-423.) Under section 186.22, subdivision (b)(1)(A), if the base felony is neither serious nor violent, the additional term is two, three or four years; if the base felony qualifies as a violent felony, then under section 186.22, subdivision (b)(1)(C), "'the person shall be punished by an additional term of 10 years.'" (*Le*, at p. 423.) As relevant here, "If the base felony qualifies as a serious felony under the list of felony crimes contained in section 1192.7, then 'the person shall be punished by an additional term of five years.'" (*Ibid.*, quoting § 186.22, subd. (b)(1)(B).)

The issue in *Le* was whether the trial court properly imposed a firearm enhancement under section 12022.5, subdivision (a)(1), and a serious felony gang enhancement under section 186.22, subdivision (b)(1)(B), based on the defendant using a firearm in the commission of a single offense. (*Le, supra*, 61 Cal.4th at p. 421.) The court looked to section 1170.1, subdivision (f), which provides, "When two or more enhancements may be imposed for being armed with or using a dangerous or deadly weapon or a firearm in the commission of a single offense, only the greatest of those enhancements shall be imposed for that

offense." (*Le*, at p. 423.) The court noted that the crime of an assault with a semiautomatic firearm (like assault with a firearm here) is designated as a serious felony in the list of serious felonies in section 1192.7 "solely because it involved a firearm," noting it qualified as a serious offense under section 1192.7, former subdivision (c)(8) ("'any felony in which the defendant personally uses a firearm"), (c)(23) ("'any felony in which the defendant personally used a dangerous or deadly weapon'"), or (c)(31) ("'assault with a deadly weapon, firearm, . . . or semiautomatic firearm'"). (*Le*, at p. 425.)

The *Le* court concluded, "[A] trial court is precluded from imposing both a firearm enhancement under section 12022.5, subdivision (a)(1) and a serious felony gang enhancement under section 186.22, subdivision (b)(1)(B) when the crime qualifies as a serious felony solely because it involved firearm use. Because both enhancements in the present case were based solely on [defendant's] use of a firearm in the commission of a single offense, section 1170.1, subdivision (f) requires that only the greater of the two enhancements may be imposed." (*Le, supra*, 61 Cal.4th at p. 429; accord, *People v. Francis* (2017) 16 Cal.App.5th 876, 881 [trial court could not under § 1170.1, subd. (f), impose both firearm enhancement and gang enhancement for offense of assault with a semiautomatic firearm]; see *People v. Rodriguez* (2009) 47 Cal.4th 501, 508 [trial court erred in imposing gang enhancement for a violent felony under § 186.22, subd. (b)(1)(C), and enhancement for personal use of a firearm under § 12022.5, subd. (a), as enhancement to crimes of assault with a firearm because enhancements violated § 1170.1, subd. (f)].)

Here, as in *Le*, the trial court erred in imposing the gang enhancement under section 186.22, subdivision (b)(1)(B), applicable to an underlying serious felony, and the firearm enhancement under section 12022.5, subdivision (a). The People argue *Le* does not apply because assault with a firearm as charged in counts 1 and 2 qualifies as a serious felony under section 1192.7, subdivision (c)(28), which lists as a serious felony "any felony offense, which would also constitute a felony violation of Section 186.22." But for purposes of the imposition of the gang enhancement for a serious felony, subdivision (c)(28) "comes into play only if the defendant reoffends, at which time any *prior* felony that is gang related is deemed a serious felony. Thus, any felony that is gang related is not treated as a serious felony in the current proceeding . . . ." (*People v. Briceno* (2004) 34 Cal.4th 451, 465 (*Briceno*).) As the *Briceno* court explained, "[T]his interpretation . . . avoids the impermissible bootstrapping that would occur if any felony that is gang related is also deemed serious in the current proceeding. Specifically, while it is proper to define any felony committed for the benefit of a criminal street gang as a serious felony under section 1192.7(c)(28), it is improper to use the *same* gang-related conduct *again* to obtain an additional five-year sentence under section 186.22(b)(1)(B)." (*Ibid.*; accord, *People v. Bautista* (2005) 125 Cal.App.4th 646, 657 [trial court erred in imposing both five-year enhancement applicable to a serious felony under § 667, subd. (a), and five-year enhancement based on § 186.22, subd. (b)(1)(B), where both enhancements were based on classification of underlying offense as serious felony based on gang allegation].)

The People urge us to adopt the same impermissible bootstrapping approach rejected by the *Briceno* court—to deem

the assault with a firearm as a serious felony in the current proceeding to support an additional five-year sentence under section 186.22, subdivision (b)(1)(B). We follow *Le* and *Briceno*, reverse the sentence, and remand for resentencing. "Remand will give the trial court an opportunity to restructure its sentencing choices in light of our conclusion that the sentence imposed here violated section 1170.1's subdivision (f)." (*People v. Rodriguez, supra*, 47 Cal.4th at p. 509.)[20]

H. *Chinchilla Was on Notice of the Allegation He Committed the Offenses Charged in Counts 1 and 2 for the Benefit of a Criminal Street Gang, in Violation of Section 186.22, Subdivision (b)(5)*

Chinchilla was sentenced on count 3 under section 186.22, subdivision (b)(5), which provides in pertinent part, "[A]ny person

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[20] The People urge us not to remand for resentencing, but instead to stay the sentence for the gang enhancement, citing to *People v. Francis, supra*, 16 Cal.App.5th at page 887 [where trial court impermissibly imposed gang and firearm enhancement, remand was not required because trial court imposed the maximum possible sentence, so there were no sentencing choices for trial court to make on remand].) Here, remand is appropriate for the trial court to exercise its discretion whether to strike the firearm enhancements imposed pursuant to sections 12022.5, subdivision (a), and 12022.53, subdivision (d), discussed below. If the trial court strikes the firearm enhancement on either count, it will not need to stay the gang enhancement. In addition, under section 12022.5, subdivision (a), the trial court may impose a term of three, four, or 10 years; section 186.22, subdivision (b)(1)(B), provides for a five-year term. Thus, depending on the trial court's exercise of sentencing discretion, either the firearm or gang enhancement will have the greater term.

who violates this subdivision in the commission of a felony punishable by imprisonment in the state prison for life shall not be paroled until a minimum of 15 calendar years have been served." Chinchilla contends the trial court erred in imposing the 15-year minimum parole eligibility requirement on count 3 because the amended information only alleged as to this count violations of section 186.22, subdivision (b)(1)(C) and (4). Chinchilla argues the imposition of a sentence for an uncharged enhancement on count 3 violated his due process right to fair notice of charges against him. This contention lacks merit because the information alleged every fact supporting the enhanced punishment, and therefore Chinchilla received fair notice of the allegation.[21]

"'Due process requires that an accused be advised of the specific charges against him so he may adequately prepare his defense and not be taken by surprise by evidence offered at trial.'" (*People v. Mancebo* (2002) 27 Cal.4th 735, 750; accord,

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[21] Chinchilla did not forfeit this argument by failing to object in the trial court because a defendant does not forfeit an argument the trial court imposed an unauthorized sentence that "'violates mandatory provisions governing the length of confinement.'" (*People v. Mancebo* (2002) 27 Cal.4th 735, 749, fn. 7 [defendant did not forfeit argument failure to allege sentence enhancement under one strike law precluded imposition of enhancement]; accord, *People v. Jimenez* (2019) 35 Cal.App.5th 373, 395 [defendant did not forfeit his challenge to unauthorized sentence where information did not place him on notice of sentence enhancement].) We therefore do not reach Chinchilla's contention his trial counsel's failure to object to the imposition of the sentence enhancement under section 186.22, subdivision (b)(5), constituted ineffective assistance of counsel.

People v. Houston (2012) 54 Cal.4th 1186, 1227 ["A defendant has a due process right to fair notice of the allegations that will be invoked to increase the punishment for his or her crimes."].)[22] However, constitutional principles of due process do not "require that the statute be specifically alleged as long as the pleading apprises the defendant of the potential for the enhanced penalty and alleges every fact and circumstance necessary to establish its applicability." (*People v. Tardy* (2003) 112 Cal.App.4th 783, 787 [where information charged defendant with robbery and alleged prior prison terms for theft offenses, defendant could be sentenced for the felony offense of petty theft with a prior theft-related conviction, even though the information did not specifically allege commission of the felony offense]; accord, *People v. Thomas* (1987) 43 Cal.3d 818, 826-828 ["'[T]he specific allegations of the accusatory pleading, rather than the statutory definitions of offenses charged, constitute the measuring unit for determining what offenses are included in a charge.' [Citation.] More importantly, 'even a reference to the wrong statute has been viewed of no consequence . . . .'"]; *People v. Fialho* (2014) 229 Cal.App.4th 1389, 1397 ["It is well-settled that only the factual allegations underlying an offense or enhancement must be pleaded, unless the relevant statute provides otherwise."].)

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[22] The courts have referred to a defendant's right to notice of charges against him or her both as a general principle of due process and of the right to due process grounded in the Sixth Amendment to the United States Constitution. (See *People v. Thomas* (1987) 43 Cal.3d 818, 823 ["We begin with the preeminent principle that one accused of a crime must be 'informed of the nature and cause of the accusation.' (U.S. Const., Amend. VI.)"].)

Although Chinchilla is correct the amended information did not expressly allege the 15-year minimum parole eligibility requirement under section 186.22, subdivision (b)(5), the amended information alleged every fact necessary to place him on notice he was subject to the enhanced punishment. Section 186.22, subdivision (b), provides for an enhancement with a prison term that depends solely on the underlying felony committed on behalf of the criminal street gang. (See *Le, supra*, 61 Cal.4th at pp. 422-423 [§ 186.22, subd. (b)(1), "provides different levels of enhancement for the base felony if that felony is 'committed for the benefit of, at the direction of, or in association with any criminal street gang . . . .' "]; *People v. Francis, supra*, 16 Cal.App.5th at p. 883 ["[section 186.22,] subdivision (b) attaches specific penalties to specific types of crimes," and "[e]ach penalty is mandatory"].) Because the underlying offense of attempted murder was punishable by a life sentence, under section 186.22, subdivision (b)(5), imposition of a 15-year minimum eligibility term was mandatory upon the jury finding the offense was committed to benefit a criminal street gang.

The amended information charged Chinchilla with attempted murder, specified the punishment for the felony as a life term, and alleged the gang allegation under section 186.22, subdivision (b), thereby placing Chinchilla on notice the punishment under section 186.22, subdivision (b)(5), applied to the offense. (See *People v. Sok* (2010) 181 Cal.App.4th 88, 96, fn. 8 [information's citation to § 186.22, subd. (b)(4)(B), did not preclude imposition of greater minimum term under § 186.22, subd. (b)(4)(A), because defendant "was plainly on notice an alternate penalty or enhancement would be sought in connection

with [the count], as well as the factual basis for that special allegation"]; *People v. Neal* (1984) 159 Cal.App.3d 69, 73 ["where the information puts the defendant on notice that a sentence enhancement will be sought, and further notifies him of the facts supporting the alleged enhancement, modification of the judgment for a misstatement of the underlying enhancement statute is required only where the defendant has been misled to his prejudice"]; see also § 960 ["No accusatory pleading is insufficient, nor can the trial, judgment, or other proceeding thereon be affected by reason of any defect or imperfection in matter of form which does not prejudice a substantial right of the defendant upon the merits."].)[23]

People v. Mancebo, supra, 27 Cal.4th at page 749, relied on by Chinchilla, is distinguishable. In *Mancebo*, the Supreme Court reversed the imposition of an enhanced sentence based on a multiple victim circumstance that was not alleged in the information. The court's holding turned on its interpretation of section 667.61, subdivisions (f) and (i), of the one strike law, which require the enumerated circumstances to be specifically pleaded in the information or indictment. (*Mancebo*, at p. 749.) As the Supreme Court explained, "We caution that our holding is limited to a construction of the language of section 667.61, subdivisions (f) and (i), read together, as controlling here." (*Id.* at p. 745, fn. 5.) The court concluded, "[T]he People's failure to include a multiple-victim-circumstance allegation must be deemed a discretionary charging decision," rather than "mistake or other excusable neglect." (*Id.* at p. 749.) Here, the People's

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[23] Chinchilla concedes the pleading error did not impact his defense.

inclusion of section 186.22, subdivision (b)(1)(C) and (4) in count 3 of the information, which do not apply to the charge of attempted murder, shows this was not a discretionary charging decision, but rather, an error in the information. (See *People v. Lopez* (2005) 34 Cal.4th 1002, 1007 [Legislature "intended to exempt [crimes with life terms] from the 10-year enhancement in [section 186.22,] subdivision (b)(1)(C)"]; *People v. Williams* (2014) 227 Cal.App.4th 733, 744-745 [10-year enhancement under § 186.22, subd. (b)(1)(C), did not apply to felony for which defendant was sentenced to life term under three strikes law]; see also § 186.22, subd. (b)(4) [specifying punishment for home invasion robbery, carjacking, extortion, and felony violations of § 246 (shooting at inhabited dwelling house, occupied building, or occupied motor vehicle) and § 12022.55 (discharging firearm from motor vehicle in commission of felony or attempted felony)].)

Moreover, unlike section 667.61, subdivision (f), there is no requirement in section 186.22, subdivision (b), that the specific circumstances supporting the penalty enhancement be pleaded in the information.[24] Rather, our holding in *Sok* is directly on point,

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[24] We note section 1170.1, subdivision (e), provides that "[a]ll enhancements shall be alleged in the accusatory pleading and either admitted by the defendant in open court or found to be true by the trier of fact." However, as the court in *People v. Fialho, supra*, 229 Cal.App.4th at page 1397 explained in holding section 1170.1, subdivision (e), did not prevent the trial court from sentencing the defendant to the applicable firearm enhancement under section 12022.5 even though the information alleged the firearm enhancement under section 12022.53, "[S]ection 1170.1, subdivision (e) does not require the prosecution to include specific statutory references for enhancement allegations. . . . [Citations.] Here the information pleaded all the facts necessary for the former section 12022.5 enhancements in

in which we concluded the trial court should have imposed the minimum term under section 186.22, subdivision (b)(4)(A), not the lesser term alleged in the information under subdivision (b)(4)(B). (*People v. Sok, supra*, 181 Cal.App.4th at p. 96, fn. 8.)[25]

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the section 12022.53 allegations." Here too, although the information did not allege the correct statutory enhancement, it alleged all facts necessary for the section 186.22, subdivision (b)(5), enhancement to apply.

[25] Chinchilla's reliance on *People v. Sweeney* (2016) 4 Cal.App.5th 295 is also misplaced. In *Sweeney*, the defendant petitioned for resentencing of his convictions of multiple theft-related offenses as misdemeanors under Proposition 47, the Safe Neighborhoods and Schools Act. (*Sweeney*, at p. 299.) The People argued because the offenses were committed for the benefit of a criminal street gang and the defendant had been sentenced under section 186.22, subdivision (b), the offenses should still be sentenced as felonies, even if reclassified as misdemeanors, under section 186.22, subdivision (d), which elevates a gang-related misdemeanor to a "wobbler" (offense punishable as a misdemeanor or a felony). (*Sweeney*, at pp. 300-301.) The Court of Appeal rejected this argument on the basis a defendant cannot be punished with both the enhancement under section 186.22, subdivision (b), applicable to a felony, and the enhancement under section 186.22, subdivision (d), applicable to a misdemeanor. (*Sweeney*, at p. 301.) Thus, because the information alleged the enhancement under section 186.22, subdivision (b), the defendant was not provided adequate notice that in the future subdivision (d) might apply. (*Sweeney*, at p. 301.) Here, there is no issue of retroactive application of an enhancement that could not have been charged at the time of the information. Rather, as discussed, the correct enhancement applicable to the crime of attempted murder was the section 186.22, subdivision (b)(5), enhancement the trial court imposed.

I. *Remand for Resentencing Is Necessary for the Trial Court To Exercise Its Discretion Whether To Strike the Firearm Enhancements*

Chinchilla contends remand is appropriate for the trial court to exercise its discretion whether to strike the firearm enhancements imposed on counts 1 and 2 (§ 12022.5, subd. (a)) and counts 3 and 4 (§ 12022.53, subd. (d)). We agree.

At the time of Chinchilla's sentencing, the trial court was required to impose the firearm enhancements under sections 12022.5 and 12022.53. (Former §§ 12022.5, subd. (c), 12022.53, subd. (h).) However, in 2017 the Governor signed into law Senate Bill No. 620 (2017-2018 Reg. Sess.), which went into effect on January 1, 2018. Senate Bill No. 620 amended sections 12022.5, subdivision (c), and 12022.53, subdivision (h), to give trial courts discretion to strike firearm enhancements under these sections in the interest of justice. (§§ 12022.5, subd. (c), 12022.53, subd. (h), as amended by Stats. 2017, ch. 682, § 2.) Both sections contain identical language: "The court may, in the interest of justice pursuant to Section 1385 and at the time of sentencing, strike or dismiss an enhancement otherwise required to be imposed by this section. The authority provided by this subdivision applies to any resentencing that may occur pursuant to any other law." (§§ 12022.5, subd. (c), 12022.53, subd. (h).)

The People concede sections 12022.5, subdivision (c), and 12022.53, subdivision (h), as amended, apply retroactively to Chinchilla, whose sentence was not final at the time those provisions came into effect. (See *People v. Johnson* (2019) 32 Cal.App.5th 26, 68; *People v. Almanza* (2018) 24 Cal.App.5th 1104, 1109; *People v. Billingsley* (2018) 22 Cal.App.5th 1076, 1080.) The People contend remand is not required because the

trial court chose the maximum terms allowed and made comments at sentencing that indicate it would have declined to strike the firearm enhancements. At sentencing, the court rejected Chinchilla's request that the trial court impose the lower term on the two counts for assault with a firearm, stating, "[T]his was a really serious set of events. This could easily be labeled as domestic terrorism. . . . [¶] . . . [¶] . . . But the fact that makes it so egregious to me are the facts that I stated that he did this with a firearm, the people were completely vulnerable. There was no provocation on their part at all. He just chose them randomly or part of just an attempt to terrorize people. . . . [¶] . . . [¶] . . . This is . . . such a horrible set of events by terrorizing a neighborhood . . .—I just can't see anything other than the maximum."

Although the record suggests the trial court would not have stricken the firearm enhancements even if it had the discretion to do so, the court was not aware of the full scope of the discretion it now has under the amended statutes. (See *People v. Gutierrez* (2014) 58 Cal.4th 1354, 1391 ["'Defendants are entitled to sentencing decisions made in the exercise of the "informed discretion" of the sentencing court. [Citations.] A court which is unaware of the scope of its discretionary powers can no more exercise that "informed discretion" than one whose sentence is or may be based on misinformation regarding a material aspect of a defendant's record.'"]; *People v. Billingsley, supra*, 22 Cal.App.5th at p. 1081 [remand is required when "the record does not 'clearly indicate' the court would not have exercised discretion to strike the firearm allegations had the court known it had that discretion"].) Remand for resentencing is required because the record does not clearly indicate the trial court would have

declined to exercise its discretion to strike the firearm enhancements had it known it had that discretion. (*People v. Johnson, supra*, 32 Cal.App.5th at p. 69 [remand was necessary notwithstanding statements by trial court that firearm enhancement was "'entirely appropriate'" for one defendant, and the court would not strike other defendant's serious prior felony enhancement "'if [it] did have discretion'"]; *People v. Almanza, supra*, 24 Cal.App.5th at p. 1110 [remand was required even though the trial court chose consecutive sentences instead of concurrent sentences for murder and assault with a firearm]; *Billingsley*, at p. 1081 [remand appropriate because, "although the court suggested it would not have stricken the firearm enhancement under section 12022.53, subdivision (c), even if it had that discretion, the court was not aware of the full scope of the discretion it now has under the amended statute"].)

J. *Chinchilla Is Entitled to a Hearing on His Ability To Pay the Assessments*

Chinchilla requests we remand the case for the trial court to conduct an ability-to-pay hearing in accordance with our opinion in *People v. Dueñas, supra*, 30 Cal.App.5th 1157 (*Dueñas*), because he was indigent at the time of sentencing. We agree Chinchilla should have an opportunity on remand to request a hearing and present evidence demonstrating his inability to pay the assessments imposed by the trial court. We leave to the trial court's discretion whether to consider Chinchilla's ability to pay the $5,000 restitution fine and the parole revocation fine in the same amount.

In *Dueñas, supra*, 30 Cal.App.5th at page 1168, this court concluded "the assessment provisions of Government Code

section 70373 and Penal Code section 1465.8, if imposed . . . upon indigent defendants without a determination that they have the present ability to pay violates due process under both the United States Constitution and the California Constitution." However, in contrast to the assessments, a restitution fine under section 1202.4, subdivision (b), "is intended to be, and is recognized as, additional punishment for a crime." (*Dueñas*, at p. 1169.) Section 1202.4, subdivision (c), provides a defendant's inability to pay may not be considered a "compelling and extraordinary reason" not to impose the restitution fine; rather, inability to pay may be considered only when increasing the amount of the restitution fine above the minimum required by statute. As we held in *Dueñas*, to avoid the serious constitutional question raised by imposition of the restitution fines, "although the trial court is required by . . . section 1202.4 to impose a restitution fine, the court must stay the execution of the fine until and unless the People demonstrate that the defendant has the ability to pay the fine." (*Dueñas*, at p. 1172.)

1. *We decline to find forfeiture of Chinchilla's arguments under* Dueñas

In their supplemental briefing, the People contend Chinchilla forfeited his objections to the trial court's imposition of the fines and assessments because he failed to object to their imposition at sentencing. However, at the time Chinchilla was sentenced, *Dueñas* had not yet been decided. As we explained in *People v. Castellano* (2019) 33 Cal.App.5th 485, 489 (*Castellano*) in rejecting this argument, "[N]o California court prior to *Dueñas* had held it was unconstitutional to impose fines, fees or assessments without a determination of the defendant's ability to

pay. . . . When, as here, the defendant's challenge on direct appeal is based on a newly announced constitutional principle that could not reasonably have been anticipated at the time of trial, reviewing courts have declined to find forfeiture." (Contra, *Bipialaka, supra*, 34 Cal.App.5th at p. 464 [defendant forfeited challenge by not objecting to the assessments and restitution fine at sentencing]; *People v. Frandsen* (2019) 33 Cal.App. 5th 1126, 1153-1154 [same].) As in *Castellano*, we decline to find Chinchilla forfeited his constitutional challenge to the imposition of the assessments.

The People contend, however, that at the time of sentencing, Chinchilla had a right under section 1202.4, subdivision (d), to challenge imposition of a restitution fine above the $300 statutory minimum, and the parole revocation restitution fine in the same amount (§ 1202.45, subd. (a)), and therefore we should not remand for an ability-to-pay hearing as to these fines. Section 1202.4, subdivision (d), provides, "In setting the amount of the fine pursuant to subdivision (b) in excess of the minimum fine pursuant to paragraph (1) of subdivision (b), the court shall consider any relevant factors, including, but not limited to, the defendant's inability to pay, the seriousness and gravity of the offense and the circumstances of its commission, any economic gain derived by the defendant as a result of the crime, the extent to which any other person suffered losses as a result of the crime, and the number of victims involved in the crime."

Although Chinchilla failed in the trial court to challenge imposition of the $5,000 restitution fine and parole revocation restitution fine, "neither forfeiture nor application of the forfeiture rule is automatic." (*People v. McCullough* (2013)

56 Cal.4th 589, 593 [finding defendant forfeited challenge to imposition of booking fee where he failed to raise his ability to pay the fee in the trial court]; accord, *In re S.B.* (2004) 32 Cal.4th 1287, 1293 ["application of the forfeiture rule is not automatic," although "the appellate court's discretion to excuse forfeiture should be exercised rarely and only in cases presenting an important legal issue"].)

Because we are directing the trial court to hold an ability-to-pay hearing on remand as to the $120 court facilities assessments and $160 court operations assessments, we leave it to the trial court's discretion whether to consider Chinchilla's ability to pay the $5,000 restitution and parole revocation restitution fines on remand. As the Supreme Court explained in *In re S.B.*, the purpose of the forfeiture rule "is to encourage parties to bring errors to the attention of the trial court, so that they may be corrected." (*In re S.B., supra*, 32 Cal.4th at p. 1293.) Because the trial court will be considering Chinchilla's ability to pay the assessments, it may also consider whether Chinchilla has the ability to pay these fines.

2. *On remand Chinchilla is entitled to an opportunity to challenge imposition of the assessments*

The People contend the record does not support a remand for an ability-to-pay hearing because Chinchilla failed to show in the trial court he did not have the financial ability to pay the fines and assessments, nor the future earning capacity to pay, including from wages he would earn while in prison. But the only information in the record regarding Chinchilla's ability to pay at the time of sentencing is that he was 25 years old and his employment and financial statuses were unknown.

The People are correct Chinchilla must in the first instance request an ability-to-pay hearing and present evidence of his inability to pay the fines and assessments. "Consistent with *Dueñas*, a defendant must in the first instance contest in the trial court his or her ability to pay the fines, fees and assessments to be imposed and at a hearing present evidence of his or her inability to pay the amounts contemplated by the trial court." (*Castellano, supra*, 33 Cal.App.5th at p. 490.) However, as discussed in the context of forfeiture, because Chinchilla was not aware of his ability to challenge the assessments on due process and equal protection grounds, we conclude he should have that opportunity on remand. Further, as noted, on remand Chinchilla may also request an ability-to-pay hearing on imposition of the $5,000 restitution fine and parole revocation restitution fine in the same amount.

We reject the People's additional contention Chinchilla has not shown a due process violation because he has not demonstrated adverse consequences from imposition of the fines and assessments. "[T]he defendant need not present evidence of potential adverse consequences beyond the fee or assessment itself, as the imposition of a fine on a defendant unable to pay it is sufficient detriment to trigger due process protections." (*Castellano, supra*, 33 Cal.App.5th at p. 490.)

DISPOSITION

We affirm the convictions but reverse the sentence and remand for resentencing with directions for the trial court to exercise its discretion whether to strike the firearm enhancements. For any count as to which the trial court declines

to strike the firearm enhancement, the court may impose only the enhancement under section 12022.5, subdivision (a), or section 186.22, subdivision (b)(1)(B), whichever carries the greater term. Further, on remand the trial court should allow Chinchilla to request a hearing and present evidence of his inability to pay the court facilities and operations assessments the court imposed. The trial court should also consider whether to allow Chinchilla to present evidence of his inability to pay the $5,000 restitution fine and the parole revocation restitution fine in the same amount imposed by the court.

FEUER, J.

WE CONCUR:

PERLUSS, P. J.

STONE, J.*

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* Judge of the Los Angeles Superior Court, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.